KUMPULAN SUA BETONG SDN. BHD.

v.

DATARAN SEGAR SDN. BHD.

SUPREME COURT, KUALA LUMPUR
MOHD. JEMURI SERJAN CJ (BORNEO)
GUNN CHIT TUAN SCJ
CHARLES NC HO J
[CIVIL APPEAL NO. 02-541-90]
16 DECEMBER 1991

LAND LAW: *Removal of caveat - Applicable principles - Interlocutory proceedings - Meaning of 'caveatable interest' - Prima facie case - Serious questions to be tried - Balance of convenience - Frivolous or vexatious - Whether 'estate land' - Whether approval of Estate Land Board required - Offence under s. 214A - Whether transfer void ab initio - Status quo - Whether Judge exercised discretion properly - National Land Code 1965, ss. 214A(10A)(a), (11), 323(1)(a), 327, 340.*

By a sale and purchase agreement dated 20 March 1980 the appellant agreed to sell to Ezan Sdn. Bhd. (Ezan) a parcel of land, Lot 849, (the said land) subject to the terms and conditions stipulated in the agreement. The appellant also agreed to hand over to Ezan a valid and registrable memorandum of transfer in favour of Ezan or its nominee within 2 months of the payment of the full purchase price. Subsequent to the signing of the agreement, Ezan resolved to sell the said land together with another piece of land (Lot 1421) to the respondent.

Ezan notified the appellant of its intention to nominate the respondent as its nominee, wherein the appellant delivered to the respondents' solicitors a duly executed memorandum of transfer of the said land upon the respondent's undertaking to effect payments to the appellant of the balance of the purchase price upon presentation for registration. The appellant was subsequently informed that as Lot 849 had been compulsorily acquired by the Government, the purchase price was to be reduced accordingly.

The respondent paid the full purchase price as agreed and the memorandum of transfer was duly presented for registration. Six years later, the appellant objected to the transfer of the said land to the respondent on the ground that in breach of Clause 2 of the sale and purchase agreement, the approval of the Estate Land Board had not been obtained for the transfer. The respondent had refused to rectify the register document of title as a result of which the appellant filed a writ and sought a declaration that the said transfer was null and void and an order that the register of titles be rectified. The appellant lodged a private caveat on the register document of title on 8 November 1989.

In the High Court, the learned Judge granted the respondent's application to have the caveat removed. This was the appeal against that decision.

It was the appellant's contention that since the said land was a portion of the bigger Lukut Estate, which was 'estate land' within the meaning of s. 214A of the National Land Code 1965 (NLC) and since prior approval of the Estate Land Board had not been obtained, the transfer was null and void for breach of clause 2 of the sale and purchase agreement and/ or s. 214A of the NLC. The appellant contended that the caveat should remain because it had a title or the right to the title to the said land.

The crucial issue for the determination of this Court was whether in order to support the caveat to remain in force, the appellant had succeeded in satisfying the Court that it is a body at whose instance a caveat may be entered under s. 323(1)(a) of the NLC. The Supreme Court reviewed *Eng Mee Yong's* case and the previous cases in determining the issue of who has a right to lodge a caveat under s. 323(1)(a) of the NLC and the nature of the onus on a caveator in an application by the caveatee under s. 327 for removal of a caveat.

The relevant questions for the Court were:

(a) whether s. 214A of the NLC applied to this case and whether the appellant has raised a serious question to be tried;

(b) if it can be proved by evidence that the said land is a portion of the Lukut Estate, whether the transfer of the said land constitutes an offence under subsection (10A)(a) and

(c) whether the transfer of the said land becomes invalid or void as a result of the contravention of s. 214A(1).

Held:

(by majority, Gunn Chit Tuan SCJ dissenting)

[1] At these interlocutory proceedings the issue to be decided is whether there are any merits in the appellant's contention for the purpose of establishing that it has a title or a right to Lot 849, that it has a *prima facie* case and that its claim is not frivolous or vexatious. The Court therefore abstained from expressing any opinion on the merits of the appellant's claim in respect of the voidness or invalidity of the transfer at these interlocutory proceedings.

[2] According to Lord Diplock's guidelines in *Eng Mee Yong's* case, the caveator must satisfy the Court that his claim to interest in the land does raise a serious question to be tried, and secondly that a balance of convenience is in favour of allowing the caveat to remain. The traditional approach was based on whether a caveator has a *prima facie* case and that his claim is not frivolous or vexatious.

[3] The two approaches may be different but the ultimate object is to determine whether a caveator, in order to maintain his caveat in force, has a claim to a title or interest in alienated land, or any right to such title or interest, although it must be said for the earlier approach that it is a direct one and easy to apply. On the facts of this case, it would be more efficacious to apply both the traditional approach adopted in the *Macon Engineering* case and Lord Diplock's guidelines as stated in *Eng Mee Yong's* case.

[4] The appellant's claim that it has a right to lodge the caveat must be minutely inquired into in order to decide whether the caveat should remain on the register document of title or be removed. The appellant's case hinges solely on the true construction of s. 214A of the NLC as presented in the affidavits.

[5] In accordance with the established canons of construction of statutes, s. 214A(1) should not be construed in isolation. The object of s. 214A is to prevent and prohibit the fragmentation of estate land within the meaning of subs. (11) of s. 214A. If therefore it can be proved by evidence that Lot 849 is a portion of the Lukut Estate, then the transfer of the lot constitutes an offence under s. 214A(10A)(a).

[6] If a transfer of a portion of an estate land is conclusive proof by force of a statutory provision of the contravention of s. 214A(1) for the purpose of a conviction then, a *fortiori*, it must, by implication, also be conclusive proof of contravention of the same subsection for

the purpose of invalidating the transfer of the Lot. Any other construction of subsection (10A)(a), (b) and subsection (1) and effect of such construction would render s. 214A ineffectual to achieve the attainment of its primary object which is the prevention and prohibition against fragmentation of estate land.

[7] It seems that s. 214A is couched in mandatory terms, non-compliance with which would be fatal to the transfer. Therefore, it would be proper and just that the caveat should remain in force and the suit should go for trial to determine whether on the evidence as they are presented to the Court the transfer is void *ab initio* or just invalid and of no effect.

[8] The question whether Lot 849 is indeed a portion of the Lukut Estate and is contiguous to the rest of the estate is also a matter to be decided by evidence and cross-examination of witnesses at the trial.

[9] On the facts, the appellant is a person claiming title to the land and its claim is neither frivolous nor vexatious.

[10] The Court was satisfied that the appellant's claim on which its caveat is based raised a serious question to be tried, the balance of convenience would be in favour of leaving the caveat in existence until the trial of the action, in the absence of any special circumstances.

[11] The learned trial Judge had not exercised his discretion under s. 327 of the NLC judicially when he clearly addressed his mind to irrelevant matters. He did not advert to or discuss in detail the decisive question of the legitimacy of the appellant's claim or the existence of serious issues to be tried by reference to s. 214A. Under the circumstances, his decision to remove the caveat becomes manifestly aberrant.

[12] There are disputed facts which could hardly subserve the existence of special circumstances to tip the balance of convenience in favour of the respondent. Always bearing in mind that the crucial issues in this appeal involve the true construction of what seems to be imperative statutory provisions and their significant effects on the transfer of the land in question coupled with all the possibilities that the respondent may do with the land to jeopardise the appellant's title to the land in the event the action is decided in its favour, it seems grossly invidious to remove the caveat. Furthermore, the learned Counsel for the appellant assured this Court that should the action fail the appellant is prepared to recompense the respondent for whatever harm it may suffer as a result of the caveat.

[13] In the light of these considerations the question of the delay in lodging the caveat in the first place does seem to matter so insignificantly as to upset the balance of convenience in favour of leaving the caveat in force. After all, the object of the lodging of the caveat is to prevent any dealings on the land. Under the circumstances, it would be proper and equitable to allow the caveat to remain in force.

[14] It was premature for the respondent to invoke the protection of s. 340 of the NLC at this stage. The proper forum for the respondent to do so would be at the trial itself.

[Appeal allowed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG TANAH: *Pelepasan kaveat - prinsip undang-undang - Prosiding interlokutori - Makna 'caveatable interest' - Kes prima facie - Soalan serius untuk dibicarakan - Imbangan kemudahan - Remih temih - Makna 'tanah estet' - Samada kelulusan Lembaga Tanah Estet diperlukan - Kesalahan di bawah s. 214A - Samada pindahmilik tidak sah ab initio - Samada Hakim menggunakan budibicara yang sewajarnya - Kanun Tanah Negara, 1965 ss. 214A(10A)(a),(11), 323(1)(a), 327, 340.*

Mengikut perjanjian jual beli yang ditandatangani pada 20 Mac 1980, pihak perayu bersetuju menjual sebidang tanah (Lot 849) kepada Ezan Sdn. Bhd. (Ezan) tertakluk kepada syarat-syarat yang terkandung dalam perjanjian tersebut. Pihak perayu juga bersetuju menyerahkan memorandum pindahmilik yang sah kepada Ezan atau wakil yang dicalonkannya. Memorandum tersebut dikehendaki diserah dua bulan selepas harga jualan dijelaskan. Justeru itu, Ezan telah membuat keputusan untuk menjual Lot 849 dan satu lagi bidang tanah (Lot 1421) kepada responden.

Setelah pihak perayu diberitahu akan perkembangan terbaru ini, ia menyerahkan memorandum pindahmilik tersebut kepada responden. Ini telah dilakukan apabila pihak responden memberi akujanji (undertaking) bahawa akan menjelaskan baki bayaran yang ditetapkan. Lot 849 telah diambil alih oleh kerajaan dan atas sebab itu, harga jualan kepada pihak responden dikurangkan.

Pihak responden menjelaskan bayaran tersebut dan memorandum pindahmilik tersebut didaftarkan. Enam tahun kemudian, pihak perayu membantah pindahmilik tersebut atas sebab kelulusan Lembaga Tanah Estet belum diperolehi dan memohon supaya pendaftaran itu dibaik pulih atau dibetulkan. Responden enggan berbuat demikian dan pihak perayu memfailkan writ dan memohon Mahkamah mengisytiharkan pendaftaran tersebut sebagai tidak sah dan justerunya memohon supaya daftar hakmilik dibetulkan. Pada 8 November 1989, perayu telah masukkan kaveat yang didaftarkan pada daftar hakmilik.

Mahkamah Tinggi telah membenarkan permohonan responden untuk melepaskan kaveat tersebut. Ini adalah rayuan pihak perayu.

Pihak perayu berhujah bahawa oleh sebab Lot 849 adalah sebahagian daripada Estet Lukut, yang merupakan 'tanah estet' seperti yang diperuntukkan dibawah s. 214A Kanun Tanah Negara 1965 (KTN) dan oleh kerana kelulusan Lembaga Tanah Estet tidak diperolehi, pindahmilik Lot 849 kepada responden tidak sah kerana melanggar fasal 2 perjanjian jual beli dan/atau melanggar s. 214A KTN.

Isu yang dipertikaikan dan yang perlu dipertimbangkan oleh Mahkamah ialah sama ada pihak perayu berjaya menyakinkan Mahkamah bahawa ia berhak masukkan kaveat dibawah s. 323(1)(a) KTN. Didalam penghakiman ini, Mahkamah Agung meniliti kedudukan perundangan dalam kes *Eng Mee Yong* dan kes-kes sebelumnya untuk memutuskan isu keupayaan sesuatu pihak berhak masukkan kaveat (caveator) dibawah s. 323(1)(a) dan onus sesuatu pihak memohon untuk mengeluarkan kaveat tersebut (caveatee) dibawah s. 327 KTN.

Soalan-soalan untuk pertimbangan Mahkamah ialah:

(a) sama ada s. 214A KTN terpakai kepada kes ini dan sama ada pihak perayu telah membangkitkan soalan serius untuk dibicarakan;

(b) jikalau terbukti bahawa Lot 849 adalah sebahagian daripada Estet Lukut, sama ada pindahmilik Lot 849 merupakan kesalahan dibawah s. 214A(10A) dan

(c) sama ada pindahmilik tanah teresebut adalah tidak sah atau *void* kerana melanggar s. 214A(1).

Diputuskan:
(oleh majoriti, Gunn Chit Tuan HMA menentang)
[1] Permohonan interlokutori yang dikemukakan sekarang hanya perlu menunjukkan atau menampilkan keupayaan pihak perayu dalam tuntutan haknya keatas Lot 849 untuk menyakinkan Mahkamah bahawa ia mempunyai kes *prima facie* dan bukan kes remih temih. Mahkamah tidak perlu memutuskan sama ada pindahmilik yang didaftarkan oleh responden adalah sah atau tidak. Soalan itu hanya boleh diputuskan diperbicaraan penuh kes ini.

[2] Mengikut garispanduan Lord Diplock dalam kes *Eng Mee Yong*, pertama, pihak caveator mesti memuaskan Mahkamah bahawa hakmilik yang dituntutnya membangkitkan soalan serius untuk dibicarakan dan kedua, bahawa imbangan kemudahan memihak kepada pengeluaran kaveat. Pendekatan traditional sebaliknya berasaskan isu sama ada pihak kaveator mempunyai kes *prima facie* dan bukan kes remih temih.

[3] Walaupun pendekatan tradisional dan pendekatan kes *Eng Mee Yong* adalah berlainan, tujuan muktamad ialah untuk memutuskan sama ada pihak kaveator mempunyai tuntutan hakmilik atau kepentingan atau hak kepada hakmilik atau kepentingan dalam tanah tersebut supaya kaveat boleh dikekalkan. Pendekatan traditional merupakan pendekatan yang lebih mudah untuk digunakan.Keadilan dapat dipelihara sekiranya keputusan dalam kes *Macon Engineering* dan keputusan Lord Diplock dalam kes *Eng Mee Yong* dipakai dalam memutuskan isu kaveat ini.

[4] Tuntutan pihak perayu bahawa dia mempunyai hak untuk masukkan kaveat mesti diteliti dengan mendalam untuk memutuskan isu sama ada kaveat mest dikekalkan diatas daftar dokumen hakmilik. Kes pihak perayu bergantung atas pentafsiran betul s.214A KTN seperti yang dikemukakan dalam afidavit-afidavit.

[5] Berasaskan prinsip-prinsip pentafsiran yang diterima, s.214A mesti ditafsir pada keseluruhannya. Tujuan s. 214A dan khususnya subseksyen (11) adalah untuk mencegah tanah estet dinegara ini dipecahbahagikan (fragmentation).

[6] Berasaskan objek s. 214A, sekiranya terbukti bahawa Lot 849 itu adalah sebahagian Estet Lukut, jelaslah bahawa pindahmilik seluruh tanah itu bercanggah dengan objek tersebut dan terbukti suatu kesalahan dibawah s. 214A(10A)(a). Seterusnya, ini bermakna bahawa pindahmilik tanah tersebut adalah tidak sah. Pentafsiran ini merupakan pentafsiran yang paling tepat berdasarkan tujuan utama s. 214A, iaiatu pencegahan dan larangan pemecahbahagian tanah estet.

[7] Seksyen 214A adalah satu peruntukan mandatori. Sekiranya ia tidak dipatuhi, pindahmilik itu tidak sah. Kaveat yang dimasukkan oleh pihak perayu patut dikekalkan sehingga keputusan diberi oleh Mahkamah selepas perbicaraan penuh supaya Mahkamah boleh memutuskan sama ada pindahmilik itu tidak sah *ab initio (void ab initio)* atau tidak sah (invalid) dan tidak berkesan.

[8] Soal sama ada Lot 849 sememangnya adalah sebahagian Estet Lukut dan berdampingan (contiguous) kepada estet pada keseluruhannya adalah soalan yang hanya boleh diputuskan melalui keterangan dan pemeriksaan balas saksi-saksi dalam perbicaraan.

[9] Berdasarkan fakta kes ini, pihak perayu adalah pihak yang menuntut hakmilik tanah dan tuntutannya bukan remih temih.

[10] Oleh sebab Mahkamah berpuashati bahawa tuntutan pihak perayu membangkitkan soal serius untuk dibicarakan, imbangan kemudahan memihak kepada pengekalan kaveat sehingga perbicaraan tersebut.

[11] Hakim Mahkamah Tinggi tidak melaksanakan kewajipan atau budibicaranya dibawah s. 327 KTN seperti yang dikehendaki. Beliau tidak meneliti isu-isu yang penting dan tidak memberi perhatian yang sewajarnya kepada permohonan perayu. Keputusan beliau untuk mengeluarkan kaveat tidak dapat diterima oleh Mahkamah Agung.

[12] Tidak ada fakta yang dapat mengukuhkan kedudukan responden setakat imbangan kemudahan berpihak kepadanya. Mengambilkira semua fakta, adalah lebih adil untuk mengekalkan kaveat. Pihak perayu juga sanggup memberi pampasan kepada pihak responden sekiranya Mahkamah Tinggi tidak membenarkan tuntutan perayu dan pihak responden mengalami kerugian.

[13] Kelewatan pihak perayu membuat permohonan ini tidak menjadi persoalan kerana tidak menjejaskan imbangan kemudahan. Perlu diingat bahawa objek memasukkan kaveat adalah untuk mencegah sebarang tindakan yang menjejaskan kedudukan atau nilai tanah tersebut, justeru itu, adalah wajar untuk membenarkan kaveat itu berkekalan.

[14] Pihak responden tidak sepatutnya membangkitkan perlindungan s. 340 KTN pada peringkat ini. Isu ini patut dikemukakan dalam perbicaraan kes tersebut.

[Rayuan dibenarkan dengan kos.]

Cases referred to:
Hassan v. Ismail [1970] 1 MLJ 210 ***(dist)***
Ho Shee Jan v. Hadayat Harta Holdings Sdn. Bhd. [1989] 1 MLJ 33 ***(dist)***
Teo Ai Choo v. Leong Sze Hian [1982] MLJ 2 ***(dist)***.
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53 ***(foll)***
Chin Cheng Hong v. Hameed & Ors. [1954] MLJ 169 ***(foll)***
Mahadevan v. Patel [1975] 2 MLJ 207 ***(foll)***
In re Faulke's Caveat [1906] 26 NZLR 392 ***(foll)***
Municipal District of Concord v. Coles [1906] 3 CLR 96 ***(foll)***
Su Meu Ging v. Philip Yong Khiam Poon & Ors. and other appeals [1988] 1 CLJ (Rep) 282 ***(foll)***
Erico Estates Sdn. Bhd. & Anor. v. The Registrar of Titles, Kedah [1980] 2 MLJ 293 ***(foll)***
Plimmer Bros. v. St. Maur; In Re Caveat No. 2538 [1906] 26 NZLR 294 ***(foll)***

Legislation referred to:
Land Enactment 1938 (Kelantan), s. 37A
Land Code 1926, s. 166
National Land Code 1965, ss. 214A(1), (2), (11), 322, 323(1)(a), 327(1), 340

For the appellant - Haji Sulaiman bin Abdullah; Zain & Co.
For the respondent - Y.M. Siew; Soo Thien Ming & Shahrizat

JUDGMENT

Mohd. Jemuri Serjan CJ (Borneo):

At the conclusion of the hearing of this appeal the Court allowed the appeal but took time to give reasons for allowing the appeal. Here are our reasons. (Datuk Haji Mohammed Jemuri Serjan CJ (Borneo) and Datuk Charles N.C. Ho J. and Tan Sri Datuk Gunn Chit Tuan, SCJ dissenting.)

This is an appeal from a judgment of the High Court at Kuala Lumpur in proceedings under s. 327(1) of the National Land Code 1965, claiming the removal of a private caveat which had been entered on the register document of title to the land under s. 322 of the Code. The learned Judge granted the application and ordered the removal of the caveat. He gave his reasons in a written judgment which was delivered on 3 December 1990. From this judgment and order of the High Court the appeal was brought before us.

By a sale and purchase agreement dated 20 March 1980 the appellant, the defendant in the Court below, agreed to sell to one Ezan Sdn. Bhd., a parcel of land held under document of Title Grant No. 4125, Lot No. 849 situate in the Mukim of Port Dickson, District of Coast, Negeri Sembilan at the price of RM972,000 subject to the terms and conditions stipulated in the agreement. The appellant also agreed to hand over to Ezan Sdn. Bhd., a valid and registrable memorandum of transfer in favour of Ezan Sdn. Bhd. or its nominee within two months of the payment of the full purchase price. Subsequent to the signing of the agreement, Ezan Sdn. Bhd., resolved to sell the said land together with another piece of land held under Grant No. 17065, Lot 1421, to the respondent for a purchase price of RM1,994,442.

Thereupon, Ezan Sdn. Bhd., notified the appellant by a letter dated 13 August 1981 of its intention to nominate the respondent as its nominee, pursuant to Clause 2 of the agreement. Apparently, the appellant raised no objection to the letter, and delivered to the solicitors of the respondent a duly executed memorandum of transfer of Lot 849 in favour of the respondent upon the respondent's solicitors' undertaking to effect payment to the appellant of the balance of the purchase price upon presentation of the memorandum of transfer for registration. On 20 August 1981 the respondent's solicitors wrote to the appellant to inform it that a portion of Lot 849 had been compulsorily acquired by the authorities and thereby the purchase price had to be adjusted and reduced to RM942,000. On 22 September 1981 the full purchase price was duly paid to the appellant. Thereupon, the memorandum of transfer of Lot 849 in favour of the respondent was duly presented for registration on 22 September 1981. In the events that happened, the respondent received a letter from the appellant on 3 February 1987, some six years later, objecting to the transfer of the said land to the respondent on the ground that no approval from the Estate Land Board for such transfer had been obtained. Later, it came to the notice of the respondent that a private caveat had been entered on the Register document of title by the appellant on 8 November 1989.

The appellant in its affidavit in opposition to the application for the removal of the caveat averred that the land held under Lot 849 was but a portion of the appellant's Lukut estate which comprised several contiguous lands totalling 1,400 acres all told. That being the case, it was expressly stipulated in Clause 2 of the agreement that the sale and purchase agreement was conditional upon the Estate Land Board, either certifying that on or about 22 September 1981, in breach of Clause 2 of the agreement, Ezan Sdn. Bhd. caused a transfer of Lot 849 be registered in the name of its nominee, the respondent, despite the fact that no application had been made to the Estate Land Board. Thereupon, since Lot 849 was a portion of the bigger Lukut estate, an estate land within the meaning of s. 214A of the Code, it was within the purview of this section, and prior approval of the Estate Land Board must be obtained, failing which the transfer was rendered null and void for breach of the sale purchase agreement and/or s. 214 A of the Code.

When the appellant discovered that Ezan Sdn. Bhd., had caused the transfer to be registered in the name of the respondent, the appellant through its solicitors, requested Ezan Sdn. Bhd. and the respondent to seek a rectification of the register document of title and effect a retransfer of Lot 849 to the appellant, stating that it was ready and willing to refund the monies that had been paid by Ezan Sdn. Bhd. The respondent had refused to do so. The appellant therefore, instituted proceedings in Court and a Writ of Summons No. S5-22-237-1987 dated 11 June 1987 and a statement of claim was filed in the High Court at Kuala Lumpur on 22 April 1987 naming Ezan Sdn. Bhd. and the respondent as 1st and 2nd defendants respectively. In this civil suit the appellant sought for:

(a) A declaration that the registration of the transfer of the said land to the 2nd defendant without the prior consent of the Estate Land Board was null and void;

(b) An order that the Register of Titles be rectified by the reinstatement of the plaintiff as proprietor of the said land in place of the 2nd defendant and on such rectification all monies that have been paid to the plaintiff be refunded to the 1st defendant;

(c) If necessary an order that the 1st and 2nd defendants do cause a retransfer of the said land to the plaintiff.

The caveat which was lodged on 8 November 1989 was intended to preserve the *status quo* of the parties pending the determination of the civil suit in the High Court. It is evident from the affidavits of the appellant and the respondent that there are serious disputes on several crucial issues, particularly on the applicability of s. 214A with regard to the transaction involving the construction of s. 214A and the interpretation of the words "estate land" as used in this section. Thus, in its affidavit the respondent disputed the appellant's right to lodge the caveat on the ground that Lot 849 did not come within the purview of s. 214A because it was not at the material time "estate land" as defined in s. 214A(1) and the transfer was not "to two or more persons" as stipulated in s. 214A(1). Therefore, the approval of the Estate Land Board was not essential and it followed that the transfer was valid. The appellant, on the other hand, averred upon the true construction of s. 214A in its entirety, this section applied as Lot 849 was but a portion of a bigger Lukut Estate of 1,400 acres. The approval of the Estate Land Board and a certificate of approval issued by the Estate Land Board were the necessary prerequisites for the validity of the transfer. Waiver was raised in the affidavit of the respondent but reliance on it was abandoned at the hearing of the application. The other area of dispute is the respondent's claim that it had obtained approval for the subdivision of Lot 849 and its conversion of category of use whereby a sum of RM3 million had already been expended for its development and improvement thus making *restitutio in integrum* impossible. Besides, its title was now indefeasible by virtue of s. 340 of the Code. The appellant disputed this claim, admitting only that some construction was commenced on the land and in fact had warned the respondent that it would not be liable for any loss or damage in the event the civil suit were decided in its favour.

The learned Judge, well aware, we must assume, that under s. 327 of the Code he has a discretion to allow or refuse the removal of the caveat, decided that the caveat should be removed from the Register document of title, basing his decision on several grounds canvassed by the learned Counsel for the respondent. It seems to us that the learned Judge fell into error when he decided the application on the basis of the consideration of the merits of the civil suit against the respondent on the assumption that the action would never come to trial but in effect would finally be disposed of by these interlocutory proceedings. This is evident from his judgment on this aspect when he decided that s. 214A which prohibits the transfer of estate land without prior approval of the Estate Land Board merely made it an offence to transfer estate land without such approval, but did not specifically declare that such a transfer was null and void *ab initio* on account of the infraction of s. 214A of the Code. To support his view he quoted the Federal Court decision in the case of *Hassan v. Ismail* [1970] 1 MLJ 210, which he considered to be applicable in the case before him, both on law and on facts. Therefore, once the transfer was valid then the respondent's title was protected under s. 340 of the Code. Secondly, relying on the decision of this Court in the case of *Ho Shee Jan v. Hadayat Harta Holdings Sdn. Bhd.* [1989] 1 MLJ 33, he held that since the full purchase price of Lot 849 had been paid the appellant was precluded from lodging the caveat or, in other words, the appellant had no longer any caveatable interest in the land.

Thirdly, there was an inordinate delay in lodging the caveat without reasonable explanations for the delay and on the authority of the Singapore High Court case of *Teo Ai Choo v. Leong Sze Hian* [1982] MLJ 2 where there was a delay of one year before civil action was

instituted, the caveat should be removed. He continued to hold that the delay had prejudiced the interest of the respondent. Lastly, *restitutio in integrum* was impossible because the land had been subdivided and charged to a bank, and therefore the appellant was estopped from attacking the validity of the transfer of the land. We are not oblivious of the fact that the learned Judge's decision was very much influenced by the respondent's arguments before him, and it was palpably evident that his judgment was entirely and substantially grounded upon the respondent's submissions without even apparent or cursory consideration of the appellant's arguments which, in our view are not without some merits, thus demonstrating an aberrant approach to the issues before him by looking at them from a wrong perspective. We will deal with this matter later.

The crucial issue for our determination is whether in order to support the caveat to remain in force, the appellant has succeeded in satisfying us that it is a body at whose instance a caveat may be entered under s. 323(1)(a). This seems to be the logical approach to the issue. Be that as it may, the approach that is common in Malaysia before the case of *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 was decided by the Privy Council, is to ask the question whether the caveator has a caveatable interest which terms are not defined in the National Land Code, by applying to him para. (a) of subsection (1) of s. 323 of the Code. The relevant question which the Court should address itself to is: Is the appellant a person claiming title to, or registrable interest in any alienated land, or any right to such title or interest? If it is not, that ends the matter and the caveat cannot be allowed to remain. The factual matrix of the claim to be a person or body within the purview of para. (a) of the subsection must be minutely considered by evidence to establish that the claim is not frivolous or vexatious. This approach can be best illustrated by reference to the judgments of all the three Federal Court Judges in the Federal Court case of *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 where reference was made to s. 323(1)(a) of the Code in the course of the judgments. At p. 54 Gill CJ (Malaya) in dealing with s. 323(1)(a) of the Code says:

> As regards the first question, s. 323(1)(a) of the National Land Code provides that a private caveat may be entered at the instance of 'any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest'. It would seem clear that the respondent cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument, but it cannot be denied that he has a right under that agreement to such title or interest by bringing an action for specific performance of the agreement, which in fact he has already done.

At p. 56, Ali FJ quoted Buhagiar J in the case of *Chin Cheng Hong v. Hameed & Ors.* [1954] MLJ 169 at p. 170, where Buhagiar J said:

> ... This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the Register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat (*In re Registration of Caveat* [1908] Innes 114.'...)

Further on in his judgment, Ali FJ said this:

> So far as the words 'any person claiming title to or any registrable interest in land' are also used in s. 323(1)(a) of the National Land Code it is a matter for consideration whether the view taken by Buhagiar J in *Chin Cheng Hong* (*supra*) or that taken by Wilson J in the other case is a correct statement of the law. Speaking for myself I incline to the view taken by Buhagiar J for the following reasons.

Raja Azlan Shah FJ (as he then was) dealt with the same subject in the following words at p. 57:

> ... In my view, the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally. That is a caveatable interest. There is statutory support for this view *vide* s. 323(1)(a) of the National Land Code which appears wide enough to include any person claiming any right to title or interest in land. This section is enacted in wider terms as compared with the corresponding provisions of previous legislation - see s. 166 of the Land Code 1926.

At p. 58 the learned Judge continued in the following words:

> In my opinion what the Court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a *prima facie* case, and that his claim is not baseless or frivolous. In such circumstances the Court will not summarily remove the caveat but will extend it until the hearing of the action. The burden of proof rests on the caveator as the person asserting the claim ...

The next case which provides illustration of the same principle is the Federal Court case of *Mahadevan & Anor. v. Patel* [1975] 2 MLJ 207 where at p. 208 Suffian LP, dealing with s. 323(1)(a), observed:

> ... and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat in my judgment it was proper for the respondent to enter the caveat, and right for the learned Judge to refuse to remove it, so that it may remain on the register until the disposal of the suit pending between the company and the appellants.

In *re Faulke's Caveat* [1906] 26 NZLR 392, in delivering the judgment of the Court, Stout CJ, with regard to the same issue, said at p. 393:

> In my opinion what the Court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a *prima facie* case. He claims that he has an interest in the land mentioned in that it was to be set aside as a reserve to which he and others were to have access. It is not, therefore, like the case of *Staples & Co. v. Corby* 19 NZLR 517 and the case referred to in that judgment, where all that existed was a covenant that the owner would do certain things. This is more than a claim to an equity or to an equitable interest; it is a claim that the caveator is entitled to use the land. Whether this is a registrable interest is surely worthy of argument and consideration. I cannot say that the claim is so baseless or frivolous that the caveator should be denied the right to be heard. And it would be a denial of the right to be heard if the caveat were removed, for once the lease is registered the caveator's rights, if he has any, are destroyed.

By way of amplification it must be said that in all these cases the Courts were concerned with the question of interest in land, both legal and equitable interest. Raja Azlan Shah FJ, however, aptly recognised that s. 323(1) of the Code deals with more than just an interest in land. Still on the question of caveatable interest under s. 323(1)(a) of the Code, the High Court of Australia case of *Municipal District of Concord v. Coles* [1906] 3 CLR 96 is also illuminating. At p. 106 Griffith CJ said:

> ... After a very anxious consideration of the words of the section and of the whole Act we have come to the conclusion that the intention of the Legislature in using the word 'interest' was that only a person having, or claiming to have, some legal or equitable interest in the land partaking of the character of an estate, or of an equitable claim upon the land, can be a caveator...

The more recent but quite a different approach to deal with the claim by a caveator that he has a right to lodge a caveat is to be found in the well known Privy Council case of *Eng Mee Yong* (*supra*) where consideration of s. 323(1)(a) was but briefly and cursorily given. It is entirely a new approach from that taken by the Malaysian Courts or, for the matter, the Australian and New Zealand Courts. At p. 215 Lord Diplock in dealing with the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for the removal of the caveat laid down the following guidelines:

> ...The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a 'probability', a '*prima facie* case' or a 'strong *prima facie* case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried. *American Cyanamid v. Ethicon Ltd.* [1975] AC 396.
>
> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat; he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

Further down the same page, Lord Diplock continued:

> ... So too in an application by the caveator under s. 327 for removal of a caveat once the caveatee has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

The general principle that can be drawn from the above observations is that to entitle his caveat to remain in force on an application for its removal by the caveatee, the caveator must satisfy the Court that his claim to interest in the land does raise a serious question to be tried, and secondly that the balance of convenience is in favour of allowing the caveat to remain. It can be clearly observed that Lord Diplock confined himself to the question of claim to an interest in the land and did not go further with the rest of s. 323(1)(a), perhaps, induced to do so, on the particular facts of the case where the caveator claimed only an interest in the land, purportedly arising out of the sale and purchase agreement.

That in enunciating the guidelines Lord Diplock drew an analogy between the onus of an applicant in an interlocutory injunction and that of a caveator is too obvious to require elaboration. The two approaches may be different but the ultimate object is to determine whether a caveator, in order to maintain his caveat in force, has a claim to a title or interest in alienated land, or any right to such title or interest, although it must be said for the earlier approach that it is a direct one and easy to apply. The *Eng Mee Yong* approach palpably places emphasis on the existence of serious questions to be tried which of necessity demands the consideration of the nature and basis of the claim to the right to caveat. In this appeal it would, in our view, be more efficacious to apply both the traditional approach adopted in the *Macon Engineering* case and Lord Diplock's guidelines as stated in *Eng Mee Yong's* case.

To revert to the issue before us the claim of the appellant that it has a right to lodge the caveat must be minutely inquired into in order to decide whether the caveat should remain on the Register document of title or be removed. The appellant's case hinges solely on the true construction of s. 214A of the Code in the light of the facts as they are presented to us by way of affidavits and by the arguments of appellant's learned Counsel. It was contended in essence by the learned Counsel for the appellant that although the land, purportedly transferred to the respondent, is actually only 209 acres, comprising in Lot 849 under Grant No. 4125 virtually it is but a portion of the bigger Lukut Estate. We were referred to the second recital and Clauses 2 and 3 of the sale and purchase agreement which for convenience sake are reproduced in whole:

> Whereas the vendor is the registered proprietor of the land in the state of Negri Sembilan held under document of title G 4125 for Lot 849 in the Mukim of Port Dickson measuring in area 207 acres more or less comprising a portion of the vendor's Port Dickson - Lukut Estate (hereinafter referred to as 'the said estate').
>
> (2) This agreement is conditional upon the Estate Land Board either certifying that the sale of the said land is not affected by the provisions of s. 214A of the National Land Code of 1965 or upon approval of the Estate Land Board being given hereto. The parties hereto shall upon execution hereof make application jointly to the Estate Land Board for such certification or approval as the case may be.
>
> (3) Subject to Clause 2 hereof the sale and purchase shall be completed on or before the expiry of twelve (12) calendar months immediately following the execution of the agreement (hereinafter called 'the completion date') when the balance of the purchase price amounting to Ringgit Eight Hundred Seventy Four Thousand and Eight Hundred (RM874,800) shall be paid by the purchaser to the vendor provided that if on the completion date hereof there has not been an acquisition of the 25 acres of the said estate as heretobefore mentioned in the preamble the parties hereto hereby agree that this agreement shall include the sale to the purchaser of the said 25 acres and that the terms and conditions herein contained shall apply equally to the sale of the said 25 acres provided further that the price of the said 25 acres amounting to Ringgit One Hundred and Fifty Thousand (RM150,000) shall be paid by the purchaser to the vendor within one calendar month immediately following the completion date ...

Under s. 214A it is postulated that prior approval of the Estate Land Board must be obtained for the sale of Lot 849 and under subsection (2) the Registrar has no authority to register a memorandum of transfer of the said land unless the instrument is accompanied by a certificate of approval granted by the Estate Land Board. Since these provisions were not complied with, and in view of the manifest prohibition against fragmentation of estate land as is implicitly stipulated therein, the transfer is accordingly null and void *ab initio*. It would therefore follow, so run the arguments, since there is no valid transfer the appellant's title to the land is not affected by the purported transfer but still intact, or, to put it at its highest, it can be said that the appellant has a right to the title to the land. Hence, it has a caveatable interest to use the non-technical common parlance. To put its case in *Eng Mee Yong's* formula the appellant has raised serious questions to be tried and that its claim is not frivolous or vexatious. That is in brief the appellant's contention. It is pertinent to interpolate at this juncture to say that we do not think it proper to approach this case upon the assumption that Civil Suit No. S5-22-237-1987 filed by the appellant in the High Court will never come to trial but will in effect be finally disposed of by these interlocutory proceedings. It is abundantly clear from his judgment the learned Judge below did just the opposite. We do not consider it proper and just that the question of the nullity or otherwise of the transfer be decided in these proceedings on contested evidence by affidavits, thereby rendering the civil suit otiose and an exercise in futility. Besides, to do so would be an embarrassment to

the Judge who hears the action. At this stage of the proceedings on the authorities of the cases of *In re Faulke's Caveat, Chin Cheng Hong* and *Eng Mee Yong,* the relevant extracts of the judgments of which had already been quoted above, what we need to decide is not the appellant must ultimately succeed but that it has a *prima facie* case and its claim is not frivolous or vexatious. Lee Hun Hoe CJ (Borneo) in *Su Meu Ging v. Philip Yong Khiam Poon & Ors. and Other Appeals* [1988] 1 CLJ (Rep) 282 at p. 286 in the course of his judgment remarked:

> On the whole we consider that the appellants had shown their claim to an interest in the property and did raise a serious question to be tried and that on the balance of convenience it would be better to maintain the *status quo.* It is not for us to speculate whether the appellants would succeed or not at the trial. But there are clearly triable issues and they are entitled to have them tried.

Similarly, Raja Azlan Shah FJ (as he then was) in *Macon Engineering* case at p. 58 expressed the same view in similar vein:

> In the present case the respondent claims that he has an interest in the said land. He has filed a claim against the registered proprietors for specific performance, damages and lien over the said property. Whether he has good grounds for his alleged claim is surely worthy of argument and consideration. I cannot say that his claim is so baseless or frivolous that he should be deprived of his chance to have that tried in an action. And it would be a denial of that chance if the caveat were summarily removed, for once the appellants registered the transfer, the caveator's right, if he has any is destroyed. I further take the view that a caveat based on a document which *prima facie* is valid will not be removed on a summary application where the facts are involved and seriously disputed ...

We would, therefore, as a matter of prudence, abstain from expressing any opinion on the merits of the appellant's claim in respect of the voidness or invalidity of the transfer at these interlocutory proceedings.

What we need to look into now is whether there are any merits in the appellant's contention for the purpose of establishing that it has a title or a right to the title to Lot 849. To do this we have to ask the further question whether s. 214A of the Code on its true construction applied to the present case, and if it does whether the appellant has raised serious questions to be tried. We are unable to agree with the contention of the respondent that in order to decide whether s. 214A(1) and (2) apply to the purported transfer we need only to look at the actual acreage of the land comprised in Lot 849 and the subject matter of the impugned memorandum of transfer and the fact that it was the only person to whom the land was transferred. It is our view that, in accordance with established canon of construction of statutes, s. 214A(1) should not be construed in isolation, divorced from other provisions of the section. It is well established that every section of an Act must be considered as a whole and self-contained with the inclusion of saving clauses and provisos. Subsections in a section must, therefore, be read as part of an integral portion and being inter-dependent, each portion throwing light, if need be, on the rest, and harmonious construction should be placed on their words for the purpose of giving effect to the legislative intent and object. As we understand it, the object of s. 214A is to prevent and prohibit the fragmentation of estate land within the meaning of subsection (11) of s. 214A at the material time. (see *Erico Estates Sdn. Bhd. & Anor. v. The Registrar of Titles, Kedah* [1980] 2 MLJ 293). This is not disputed.

Subsection (10A)(a) is indubitably a penal provision and it makes it an offence punishable with imprisonment for a term and not less than one year and not more than three years and to a fine not exceeding ten thousand ringgit for any person who transfers, conveys or

disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of subsection (1). Section 214A(1) reads as follows:

> Notwithstanding anything contained in this Act no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as 'the board') established under subsection (3)

However, the proof of the commission of an offence under subsection (10A)(a) can be gathered from the fact that the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or **to convey or dispose of any portion or portions of estate land to one or more persons, without the approval of the Estate Land Board.** In the event of such execution of the agreement it becomes conclusive proof that the estate land is conveyed or disposed of in contravention of subsection (1). This is provided in subsection (10A)(a). If, therefore, it can be proved by evidence that Lot 849 is a portion of the Lukut Estate, then the transfer of this Lot constitutes an offence under subsection (10A)(a).

The next pertinent question to be asked is: Does the transfer of that lot also become invalid or void because it contravenes s. 214A(1)? In other words, can it not be argued that if it is an offence to transfer a portion of an estate land, being in contravention of s. 214A, similarly that transfer of Lot 849 is accordingly and for the same reasons invalid? It would seem to us that if a transfer of a portion of an estate land is conclusive proof by force of a statutory provision of the contravention of s. 214A(1) for the purpose of a conviction then, a *fortiori*, it must, by implication, also be conclusive proof of contravention of the same subsection for the purpose of invalidating the transfer of the lot. Any other construction of subsection (10A)(a), (b) and subsection (1) and effect of such construction would render s. 214A ineffectual to achieve the attainment of its primary object which is the prevention and prohibition against fragmentation of estate land. If s. 214A in its entirety is thus construed, we venture to say there is a strong likelihood that the appellant may succeed in the civil suit, although for the purpose of maintaining a caveat we hasten to emphasize, lest the forgoing statement be misunderstood, that it is only necessary for the appellant to show it has a *prima facie* case or that its case is well grounded as is the case here. It seems to us on first blush that s. 214A is couched in mandatory terms non-compliance with which would be fatal to the transfer. Under the circumstances, it would be proper and just that the caveat should remain in force and the suit should go for trial to determine whether on the evidence as they are presented to the Court the transfer is void *ab initio*, or just invalid and of no effect. The question whether Lot 849 is indeed a portion of the Lukut Estate and is contiguous to the rest of the Estate is also a matter to be decided by evidence and cross-examination of witnesses at the trial.

Ex hypothesi s. 214A applies then there is the further crucial issue whether the transfer is void *ab initio* or invalid and unenforceable or voidable. The issue entails the consideration of the class into which s. 214A falls to be categorised, *viz*, whether it is "mandatory" or "directory" and its effect on the transfer. The issue is further confounded by the protean nature of the words "void" and "voidable", depending on whether they are used in the field of the law of contract or public law. There are bound to be conflicts in the authorities on both issues, and if there be such conflict of authorities it must be resolved at the trial. Furthermore, we had not been addressed on these issues making it more appropriate that the matter should not be decided here at this stage. The observations of Stout CJ in *Plimmer Bros. v. St. Maur, In re Caveat No. 2538* [1906] 26 NZLR 294 at p. 295 would seem to be relevant:

> In my opinion the caveat cannot be set aside unless the claim to the estate appears to be without any validity. If there is a reasonable question to argue the Court should not remove the caveat, but permit the matter to be litigated ...

So are the observations of Raja Azlan Shah FJ (as he then was) in *Macon Engineering's* case and Lee Hun Hoe CJ (Borneo) in *Su Meu Ging's* case adverted to earlier on in the judgment. In the light of our view of the appellant's contention on its claim to the title to Lot 849 we are satisfied that it is a person claiming title to the land and that its claim is neither frivolous nor vexatious.

We have been referred to the Federal Court case of *Hassan v. Ismail* (*supra*) on which the learned Judge placed so much weight in his judgment for the proposition that a sale and purchase agreement is not void *ab initio* where the statutory prohibition against the transfer of land is not absolute and where there is a provision for exemption from the prohibition. In the first place s. 37A of the Kelantan Land Enactment is not in *pari materia* with s. 214A. In the Kelantan Land Enactment there is a provision for His Highness the Sultan in any particular case by order in writing to grant exemption from any of the provisions of s. 37A whereas in the case of s. 214A no land is capable of being transferred unless approval of such transfer has **first** (emphasis added) been obtained. In other words, the prior approval of the Estate Land Board is a postulated prerequisite to the validity of the transfer. Approval after transfer is not contemplated nor intended in s. 214A and so is out of the question. In that case Suffian FJ (as he then was) took the view that since there was a provision for exemption the respondent could have applied for exemption from the prohibition. Secondly, in that case the transfer had not been effected, and therefore there was time to apply for exemption. Such is not the case before us where the land had actually been transferred *albeit* without the approval of the Estate Land Board and the registration of the instrument was executed without being accompanied by a certificate of approval. We do not think that this case is of any assistance to the respondent.

On the question whether after the transfer of Lot 849 had been registered and the full purchase price had been paid the purchaser could still lodge a caveat against the said land, *Ho Shee Jan v. Hadayat Harta Holdings Sdn. Bhd.* (*supra*) was quoted as authority for the proposition that under such circumstances the caveat cannot remain on the register document. Again, this case can easily, as in the case of *Hassan v. Ismail* (*supra*), be distinguished from the facts of the present case. In that case the respondent, Hadayat Harta Holdings Sdn. Bhd., had agreed to sell three lots of land to Ho Shee Jan, the appellant, for the price of RM330,000 which the respondent acknowledged to have received. It was, *inter alia*, also agreed that the respondent should repurchase the said land for the sum of RM580,000. Although the purchase price was paid in full the said land had not been transferred to the name of the appellant and the respondent's name remained as the registered owner. The appellant subsequently applied to enter caveats against the land because he claimed to be the purchaser of the land and also claimed that the respondent had not completed the repurchase of the land. The respondent applied to the High Court for the removal of the caveats. The respondent contended that the repurchase had been completed and it had become the owner and the appellant had no more caveatable interest in the said land. The application was granted and the appellant thereupon appealed to the Supreme Court which dismissed the appeal. On the facts of the case the respondent had paid the appellant in full the repurchase price of RM580,000 and therefore the appellant did not have a caveatable interest anymore in the land. The claim of the appellant that he had a caveatable interest was based on the contention that the repurchase of the land by the respondent had not been completed and that he was still the registered owner when in fact this was not the

case as found by both the High Court and the Supreme Court. The present case revolves around non-compliance with s. 214A of the Land Code and as we have said earlier on the matter is to be tried in the action itself and not at the interlocutory proceedings stage. Manifestly, therefore, *Ho Shee Jan's* case has no application to the present case. We wish to comment here that these two cases were taken out of their context and thus without careful examination of the facts and the *ratio decidendi* of these cases they can be very misleading and conducive to erroneous decision on the crucial issues by the less circumspect of Judges.

Similarly, *Eng Mee Yong's* case can be distinguished on the question whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. In that case Lord Diplock agreed with the judgment of the High Court to allow the removal of a private caveat because he was satisfied that the affidavits of the respondent contained implausible and self-cotradictory assertions and that the statements in his affidavits were equivocal, lacking in precision, inconsistent with undisputed contemporary documents. In his view the allegations in the respondent's affidavit were insufficient to disclose that there was any serious question to be tried as to whether any agreement for the sale of the land by the appellant to the respondent was still subsisting at the date of the hearing of the application. The effect of the Privy Council decision is to render the respondent's action in the High Court nugatory, it having been literally disposed of. In the present case we are satisfied that the appellant's claim is not frivolous and vexatious and that there are serious questions to be tried with the result that, unlike *Eng Mee Yong's* case, we have decided the civil suit should go for trial.

In an application under s. 327 the learned Judge is vested with a discretion which he must exercise judicially or according to law. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigations as to their truth, that is, the matter should go for trial. (*Eng Mee Yong* (*supra*) per Lord Diplock at p. 217) We respectfully agree with this observation and we are mindful of the fact that it is not our function to exercise an independent discretion of our own. We may differ from the learned Judge's exercise of his discretion and must not interfere with it merely upon the ground that we would have exercised the discretion differently.

Nevertheless, we may set aside the learned Judge's exercise of his discretion on the ground that he had not acted judicially or that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist. We have given anxious consideration to this matter and we, with respect, do not think that the learned Judge had exercised his discretion judicially when he clearly addressed his mind to irrelevant matters. Nowhere in his judgment did he ever advert to and discuss in detail the decisive question of the legitimacy of the appellant's claim or the existence of serious issues to be tried by reference to s. 214A. He had completely brushed aside the appellant's contention on the applicability of s. 214A to the case, holding that it did not apply to the transfer of the 207 acres, it not being an estate land as understood in the Code. Under the circumstances, we are justified in making a finding that the learned Judge had not exercised his discretion judicially so that his decision to remove the caveat becomes manifestly aberrant.

Eng Mee Yong's case also lays down the proposition that if a caveator has succeeded to satisfy the Court that his claim is neither frivolous nor vexatious, nevertheless the appellant must go on to show on the balance of convenience that it would be better to maintain the *status quo* until the trial of the action, by preventing the respondent from disposing of its

land to some third party. In this regard to quote Lord Diplock's observations at p. 215 of that case, repetitive it may seem but nevertheless purposive, would be instructive to the instant case. The relevant part is in the following words:

> ... So too in an application by the caveator under s. 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious matter to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he allegas had been tried.

It must be noted that all the Malaysian, New Zealand and Australian cases already quoted in this judgment did not consider the question of balance of convenience in dealing with an application for removal of a caveat. Their emphasis was only on whether the caveator had a caveatable interest.

Inordinate delay was another ground for the learned Judge below to allow removal of the caveat, relying as authority for his decision on the Singapore High Court case of *Teo Ai Choo v. Leong Sze Hian* (*supra*). The learned Judge, with due respect, allowed himself to be persuaded to accept this case as an authority that delay in lodging a caveat is fatal to the continuation in force of the caveat without giving due and careful consideration to the context of the case. We had carefully examined that case and noted that the delay was not in lodging the caveat but was related to the commencement of the action by the defendant in respect of their dispute. Sinnathuray J based his decision on an extract of the judgment of Stout CJ in the case of *Plimmer Bros. v. St. Maur* (*supra*) which reads as follows:

> It was his duty to commence an action promptly if he considered himself entitled to specific performance ... Here nothing was done for nearly sixteen months, and then a caveat was lodged. More than a month has elapsed since then, and still no action has been commenced. In my opinion an action for specific performance under such circumstances must be deemed vexatious...in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the Court will not lend its assistance to such a proceeding.

Therefore, *Teo Ai Choo's* case does not avail the respondent. No other authorities were quoted on this question. If at all, delay may be a factor that can be taken into consideration in dealing with the question where the balance of convenience would lie. However, in view of Lord Diplock's observation quoted above, since we are satisfied that the appellant's claim on which its caveat is based raised a serious question to be tried, then the balance of convenience would be in favour of leaving the caveat in existence until the trial of the action, in the absence of any special circumstances. Furthermore, we have not been addressed on the presence of special circumstances in this case although the learned Counsel referred us to the affidavit of Soo Tian Chai, a director of the respondent company. In his affidavit, Soo Tian Chai averred that the respondent had obtained approval for the subdivision of the said land and the category of land used and had expended some RM3 million towards the development and improvement of Lot 849. This was vigorously disputed by the appellant. In his affidavit, Wong Yew Fai, a director of the appellant company, denied any knowledge of the subdivision, conversion of use of land, the improvement and development on the land and the amount spent thereon. He claimed that the appellant had given notice through its solicitors to the solicitors of Ezan Sdn. Bhd. and that the appellant would not be liable for any loss or damage which the respondent might have incurred in the event the suit was decided in the respondent's favour. No evidence of the actual expenditure on the improvement and development was introduced in the Court below to support the respondent's claim.

However, the learned Counsel for the respondent submitted before us that preparations were made for the development of the said land in reply to the learned Counsel for the appellant's submissions that there was nothing on the land.

These are disputed facts and could hardly subserve the existence of special circumstances to tip the balance of convenience in favour of the respondent. Always bearing in mind that the crucial issues in this appeal involve the true construction of what seems to be imperative statutory provisions and their significant effects on the transfer of the land in question coupled with all the possibilities that the respondent may do with the land to jeopardise the appellant's title to the land in the event the action is decided in its favour, it seems grossly invidious to remove the caveat.

Furthermore, the leaned Counsel for the appellant assured this Court that should the action fail the appellant is prepared to recompense the respondent for whatever harm it may suffer as a result of the caveat. In the light of these considerations the question of the delay in lodging the caveat in the first place does seem to matter so insignificantly as to upset the balance of convenience in favour of leaving the caveat in force. After all, the object of the lodging of the caveat is to prevent any dealings on the land. Under the circumstances, it would be proper and equitable to allow the caveat to remain in force.

As for the protection of s. 340 of the National Land Code sought by the respondent, it would appear to be premature to invoke the protection under this section at this stage. The proper forum to raise this question is the trial itself where the question of the rectification of the Register of Titles by the reinstatement of the appellant as proprietor would be argued.

We realize it is imperative that the action should be heard as early as possible but we do not consider it proper to make an order for an early trial and fix the date of the trial. It is consistent with the practice of this Court to leave the matter of the fixing of the date of early trial to both Counsel to apply to the appropriate quarters. We need only to say that an early trial is recommended.

For the reasons we have given above in our judgment, we would allow this appeal with costs. The order of the High Court dated 3 December 1990 is set aside. The deposit is to be refunded to the appellant.

Also found at [1992] 1 CLJ 20